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entitled to do so. And by Section 39 of Act IX of 1850 he may set off a cross claim, though it exceeds Rupees 500. But this is an action for damages ; and it is the only action which the plaintiff could bring. The plaintiff was certainly at liberty to re-sell the goods upon the defendant's refusal to take them ; and, after the re-sele by him, he could not sue for the price. His only claim was for the loss on the re-sale. *Lamond* v. *Davall*, 9. Q. B. 1030. The amount of that loss was only Rupees 344-5-9, and clearly therefore, in our opinion, the Court of Small Causes had jurisdiction.

ORIGINAL JURISDICTION (*a*)

Original Suit No. 321 *of* 1865.

AGAR CHAND *against* P. VIRARÁGHAVALU CHETTI.

In a suit for money due on 3 promissory notes, two of them executed by defendant and one T. in favor of plaintiff, the third by defendant alone, the defence was that the plaintiff agreed to give up the three notes sued upon and to take in lieu thereof a single note, signed by T. while a Petitioner in Insolvency, in favor of defendant, and by defendant endorsed to plaintiff.

Held, that, as the consideration for the making of that note by T. was the defendant's withdrawing his opposition in the Insolvent Court, that that arrangement was brought about by plaintiff, to secure to himself and defendant an undue share of the Insolvent's property, and was an arrangement contrary to the policy of the Insolvent Act and therefore void.

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THE plaintiff claimed Rupees 2,476-2-0, principal and interest on three promissory notes. The first dated 29th October 1862, executed by the defendant and one William Dudley Taylor in favor of the plaintiff. The second dated 11th November 1862, executed by the defendant alone. The third dated 23rd December 1862, executed by defendant and the said William Dudley Taylor. Taylor had obtained the benefit of the Insolvent Act on the 19th December 1863. The defendant pleaded that he signed as surety only and that plaintiff had agreed to take a note for Rupees 3,000, which had been signed by Taylor, after he had petitioned the Insolvent Court, in favor of the defendant and endorsed by him to the plaintiff, in lieu of the three notes sued upon.

(*a*) Present Scotland, C. J., and Bittleston, J.

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The issues settled were :—I. Whether the plaintiff entered into any valid and binding agreement that the promissory notes in the plaint mentioned should be cancelled and given up to the defendant, the plaintiff accepting and receiving in full satisfaction thereof another promissory note for Rupees 3,200, made by the said William Dudley Taylor in favor of the defendant and by the defendant endorsed to the plaintiff, as is in the written statement of the defendant alleged. II. Whether the defendant signed the two promissory notes in paras. 1 and 3 of the plaint mentioned as surety only for the said William Dudley Taylor, and whether the defendant is discharged from liability thereon by the plaintiff having given time to the said William Dudley Taylor for payment thereof.

Miller, for the plaintiff.

Mayne, for the defendant.

The judgment of the Court was delivered by

SCOTLAND, C. J. :—This is a suit on three promissory notes, of which one is signed by the defendant alone, and the other two by him jointly with one W. Dudley Taylor who has since obtained his discharge under the Indian Insolvent Act. The defence is that the plaintiff agreed to give up the three notes now sued upon, and to take in lieu thereof another note for 3,000 Rupees, which was signed by Taylor, after he had petitioned the Insolvent Court, in favor of the defendant, and by the defendant endorsed to the plaintiff, and the question is whether there was any consideration for that agreement on the part of the plaintiff. Certainly there was no other consideration than the new promissory note, and if that was a mere piece of waste paper in his hands, he received no consideration and is not bound by the agreement. We are of opinion that the new note worthless excepting in the hands of an innocent indorsee. It is quite clear that the consideration for the making of that note by Taylor was the withdrawal by the defendant of the opposition of which he had given notice in the Insolvent Court; that that arrangement was brought about by the plaintiff; and that the object of it was to secure if possible for these two creditors a larger share of the property of the

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Insolvent than would come to them upon a rateable division in the Insolvent Court. In fact by this arrangement Agar Chand and Virarághavalu, continuing creditors in the Schedule, jointly endeavoured to obtain from the Insolvent the liquidation of the debts of both in full. It was an arrangement distinctly contrary to the policy of the Insolvent Act, and on that ground illegal. The authorities for this in the English Courts are numerous and they are strictly applicable ; for so far as regards this question there is no material distinction between the English and the Indian Insolvent Acts.

In *Jackson* v. *Davison* (IV. B. and Ald. 691) in order to induce a creditor (who had given notice of opposition) to withdraw his opposition, the Insolvent agreed to execute within 3 days after his discharge a warrant of attorney for the debt, and in the meantime to give a promissory note of a 3rd person for the amount, which was to be delivered up by the creditor on the execution of the warrant of attorney. The Insolvent was discharged, the warrant of attorney executed and the note given up. The debt was to be paid by instalments ; and the 1st instalment not being paid, the creditor entered up judgment and sued out execution. Upon an application to set aside the warrant of attorney and Judgment and to discharge the Insolvent, the Court of Queen's Bench made the rule absolute. BAYLEY, J., said, "It is part of the policy of the Insolvent Debtors' Act, that the property of the debtor shall be divided rateably among, his creditors. Now if this warrant of Attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtor which the legislature manifestly intended to be distributed among all the creditors." So HOLROYD, J., says : "This warrant of Attorney was founded upon an agreement which is in direct opposition to the policy of this Act of Parliament."

Again in *Rogers* v. *Kingston*, (2 Bing. 441)the Court of Common Pleas set aside a warrant of Attorney which had been signed under these circumstances :—The creditor had with-

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drawn his opposition to the insolvent's discharge, after stipulating for and receiving a promissory note for his debt payable by instalments. Subsequently the insolvent was arrested in an action on that note, but settled the action by giving a warrant of Attorney, in which his brother joined him for the debt, costs and interest, payable by instalments: one instalment was paid, and then an application made to the Court to set aside the warrant, and for a return of the 1st instalment which had been so paid. And that application was granted. BEST, C. J., said, "This is clearly distinguishable from the case of a party who makes a new promise when he is clear and *sui juris*, and where the new promise would lay him under a moral obligation, which he would be bound to fulfil, but *if the new promise by the price of a consent to withdraw an opposition*, no moral consideration can arise; the whole transaction is a trick and fraud between the two parties to cheat the other creditors."

The same principle governed the decision in *Murray* v. *Reeves* (VIII B. & C. 421). There the Attorney of the Insolvent undertook, in consideration of the creditors withdrawing all further opposition, that if the Court would appoint a particular creditor, who had opposed the Insolvent, to be assignee, he the assignee should receive from the Insolvent's estate within 3 weeks £90 or £100, and he also guaranteed £40 in lieu of certain furniture.

The creditor withdrew his opposition and was appointed assignee, and the Insolvent was discharged. The money not being paid, the assignee sued the Attorney upon his undertaking; but the Court held that the action could not be maintained, as the agreement was contrary to the policy of the law of insolvency and therefore void. "It is obvious" said Lord Tenterden in delivering the judgment of the Court (p. 425) "that a measure of this kind takes from the Commissioners that superintendence, control and power of imprisonment for a time, which the legislature intended to vest in them; and, consequently, deprives the other creditors of the benefit of that full disclosure, voluntarily and freely to be made, which they are entitled to have. Such bargaining, whatever may have been intended or effected in the

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particular case, may, in many cases, give protection to fraudulent concealment, to the great prejudice of creditors, and is, therefore, in our opinion, contrary to the policy of this part of the law, and consequently void." In *Hall* v. *Dyson*, (17 Q. B. Rep. 785, 21 L. J., Q. B. 224), the action was also brought upon an agreement by the Attorney of the Insolvent to pay a sum of money, in consideration of the plaintiff, who was a creditor, withdrawing his opposition; and it was held that the action could not be maintained. PATTESON, J., said, "If there is any illegality in this agreement, I quite agree with the doctrine laid down in *Gould* v. *Williams*, that this is in truth a fraud on the rest of the creditors." *Gould* v. *Williams* (4 Dowl. P. C. 91), referred to by Patteson, J., was a case in which the Insolvent had given a bill upon the creditor's withdrawing his opposition, and the Insolvent having afterwards been arrested thereon, the Court ordered the bail bond to be delivered up to be cancelled.

In *Hills* v. *Mitson* (8 Exch. Rep. 751, 22 L. J. Exch. 273.) the action was on a promissory note by indorsee against maker; and the defendant pleaded in substance that he had given the note to persons who were creditors of an Insolvent petitioner, in consideration of their withdrawing their opposition to the discharge of the Insolvent, and that the plaintiff had taken the note from creditors with notice of the facts. On the authority of *Hall* v. *Dyson*, the agreement was held to be illegal and the plea good. Now if Agar Chand, the present plaintiff, had made any attempt to enforce the promissory note for Rupees 3,000 against either Taylor or Virarághavalu, it is clear that this case would have been decisive against him.

The latest case on the subject is that of *Humphreys* v. *Welling* (32 L. J. Exch. 33). The action was by payee against maker of a promissory note; and the plea that the note was given in pursuance of an unlawful agreement between the plaintiff and defendant, that the plaintiff would forbear to oppose the making of the final order upon defendant's petition for protection under the Insolvent Act. The replication was that the arrangement for giving the new note was made with the privity, consent and allowance of

the Insolvent Court, and at the suggestion and requirement of the Commissioner that the Insolvent should come to some arrangement with the plaintiff in respect of the said debt. On demurrer, the Court held the plea good and the replication bad. Pollock, C. B., in giving judgment said, " We are all inclined to think that the Court had no authority to allow such an arrangement, and that the consent of the Court does not render it legal."

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We have referred to these authorities more fully than we should otherwise have thought necessary—because we have reason to believe that arrangements similar to that which has been set up by way of defence to the present suit are of frequent occurrence, and it is desirable if any doubts are entertained as to the illegality of such arrangements, that those doubts should be at once removed.

As to the 2nd issue we need add nothing : for the defendant's Counsel did not and could not rely upon it. There must therefore be judgment for the plaintiff for the amount claimed with costs and for interest at 6 per cent.

Judgment for plaintiff.

APPELLATE JURISDICTION. (*a*)

Regular Appeal No. 61 *of* 1865. (*b*)

TARA CHAND..... *Appellant.*

REEB RAM..... *Respondent.*

A member of an undivided family brought a suit for partition against his father the managing member, and 8 others, of whom 2nd, 3rd and 4th defendants were plaintiff's infant brothers, and obtained a decree. The Civil Judge proceeded to ascertain the amount of the plaintiff's share in the following manner. He assessed what he considered to be the sum received by the 1st defendant from the estate ; deducted from that sum what he considered should have been the gross expenditure for the defendant, and decreed delivery by the defendant of $\frac{1}{5}$th of the remainder. *Held*, that such a decree is erroneous.

THIS was a regular appeal from the decree of J. H. Goldie the Civil Judge of Tinnevelly, in Original Suit No. 1 of 1864.

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Miller, for the appellant, the 1st defendant.

Advocate General, for the respondent, the plaintiff.

(*a*) Present Holloway and Collett, J. J.

(*b*) See page 50 of this Vol.